WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE THE ARBITRATOR

* *

n the Matter of the Arbitration Between	)	Case 210
KENOSHA COUNTY	)	No. 61927
and	)	INT/ARB-9826
LOCAL 990, AFSCME, AFL-CIO	)	Dec. No. 30797-A
Kenosha County (Jail Staff) Employees	)	**DECISION and AWARD**

* *

Appearances: For the Employer, Kenosha County Corporation Counsel Frank Volpintesta, Kenosha.
For the Union, Wisconsin Council 40 Staff Representative John J. Maglio, Racine.

On December 19, 2002, Kenosha County (referred to as the Employer or the County) filed a petition with the Wisconsin Employment Relations Commission (WERC) pursuant to Section 111.70(4)(cm)(6) of Wisconsin's Municipal Employment Relations Act (MERA) to initiate arbitration. Local 990, AFSCME, AFL-CIO (referred to as the Union) and the Employer had negotiated for a successor to their collective bargaining agreement which covered the period from 2000 through 2002 but they failed to reach agreement on all issues.

The unit represented by the Union includes approximately 150 civilian Correctional Professionals employed by Kenosha County. About half of the members of the bargaining unit (called Correctional Officers and formerly called Jailers) work at the County's downtown jail and the remainder (called Direct Supervision Officers) work at the County's Detention Center. The first collective bargaining agreement between the parties covered the period 1984 through 1986 and the original bargaining unit consisted only of Jailers at the County's Public Safety Building. In 1998, the County's Detention Center (originally intended to be a House of Corrections) was built. Shortly thereafter, by agreement, Detention Center employees were accreted into the Jailers bargaining unit represented by Local 990 and were placed at the same level of pay as the downtown Jailers. Center employees, however, retained their work schedule which was distinct from the Jailers work schedule.

On February 5, 2004, following an investigation by a WERC staff member, the WERC determined that an impasse existed and that arbitration should be initiated. On March 4, 2004, the undersigned, after having been selected by the parties, was appointed by the WERC as Arbitrator to resolve the impasse. By agreement of the parties, she held an arbitration hearing on May 26, 2004, in Kenosha, Wisconsin, at which time the parties were provided with a full and fair opportunity to present evidence and make arguments. The hearing was transcribed. Post-hearing briefs were filed and exchanged. The undersigned received the last correspondence in this proceeding on September 29, 2004.

ISSUES AT IMPASSE

Although the parties reached tentative agreement on a number of issues to be included in their 2003 through 2004 collective bargaining agreement, they were unable to resolve three issues which relate to: 1) wages for 2003 and 2004, 2) health insurance plan changes proposed by the County, and 3) work schedule changes proposed by the County for bargaining unit members working at the downtown jail. The Employer's final offer is attached as Exhibit "A" and the Union's final offer is attached as Exhibit "B." An additional issue arose after briefs had been filed when the Union challenged the appropriateness of supplemental exhibits submitted by the County. This issue is considered separately in the "Discussion" section.

STATUTORY CRITERIA

In reaching a decision, the undersigned is required by Section 111.70(4)(cm)(7)-(7r) of MERA to consider and weigh the evidence and arguments presented by the parties as follows:

7. "Factor given greatest weight." In making any decision under the arbitration procedures authorized by this paragraph. the arbitrator or arbitration panel shall consider and give the greatest weight to any state law or directive lawfully issued by a state legislature or administrative officer, body, or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

7g. "Factor given greater weight." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration shall consider and give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r.

7r. "Other factors considered." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or the arbitration panel shall also give weight to the following factors:

a. The lawful authority of the municipal employer.
b. Stipulations of the parties.
c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of the proposed settlement.
d. Comparisons of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services.
e. Comparisons of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.

f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and comparable communities.
g. The average consumer prices for goods and services, commonly known as the cost of living.
h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties in the public service or in private employment.

POSITIONS OF THE PARTIES

The County

In supporting its final offer covering the three unresolved issues, the County systematically addresses the pertinent statutory standards which must be considered by the Arbitrator in reaching her decision. First, although the County expressly states it is not making an (in)ability to pay argument, it believes the County's total financial picture and dilemma must be considered. State mandates, decreases in aids, grants and revenues, a bad economy for most of the term of this agreement, public sentiment on taxes, statutorily imposed limitations upon the County's ability to tax, and steps already taken by the County to make significant reductions in various types of expenditures (including personnel and capital projects) all combine to demonstrate the County's difficult financial situation, a factor which the Employer emphasizes must be given "greatest weight."

In addition, the County contends that the "greater weight" factor relating to the local economy also clearly favors the County's position in this proceeding. The County points to low cost-of-living (CPI) and specific unemployment data, below average personal incomes, lower paid replacement job opportunities, and higher poverty levels than in comparable counties, an increase in bankruptcies, and increased property tax bills compounded by a faltering state and national economy and rising costs for gasoline, utilities, and health care (including drug costs) as strong support for its final offer.

1) Wages and Health Insurance[1]

Turning to wage and health insurance comparability data, the County argues that a more sophisticated approach to determine comparable counties is needed than was used in the past. For example, it notes that since this unit consists of civilian jailers, only counties with a comparable civilian workforce and not sworn deputy jailers are suitable comparisons. It rejects the Union's use of Milwaukee County as a comparable because of differences in size of population, budget, and tax base. Next, the Employer makes intra-unit comparisons and notes that downtown Jailers work under the same job description as do the Direct Supervision Officers (DSO) at the Detention Center. However, the former group works under a different work schedule and receives approximately $1800 per year more than the latter group for approximately the same total number of hours worked per year. The Employer further notes that, in comparison with other County bargaining units, this unit fares "very well" as to health insurance, vacations, and the fact that other bargaining units have already agreed to longer (three or four year) agreements in contrast to this unit's agreement for 2003 and 2004 which is the subject of this arbitration proceeding. Finally, as to external comparables, the County relies upon evidence it has introduced to establish that members of this unit fair far better than their (civilian only) counterparts in comparable communities.

On the specific issue in dispute relating to health insurance, including prescription drug benefits, the County calls attention to the national health care crises which has particularly affected southeast Wisconsin and Kenosha County with exceptionally high health care costs. A special problem faced by the County is that other bargaining units have already agreed to change to more cost effective health care plans (incorporating and promoting effective consumerism) from the existing one which only covers this bargaining unit and the County emphasizes the recognized importance of having similar health care benefits for <u>all</u> County employees.

2) Work Schedule Issue

The final issue in dispute dealt with extensively in the County's brief relates to "Kelly Days," an historical response to the fact that jails operate 24 hours a day, seven days a week. To accommodate this requirement, civilian employees at the County's downtown jail have worked for many years a schedule of six consecutive days followed by two days off (a "6/2" schedule). This schedule provides the needed coverage and also permits all bargaining unit members working a 6/2 schedule to have some weekends off during the year. Several rationales have been given for instituting "Kelly Days" or "paid Kelly Days" and the parties have emphasized different rationales in their continuing dispute revolving around defining the County's obligation for "paid Kelly Days." One rationale which the County claims is offered by the Union is that "Kelly Days"are a response to comply with FLSA and the mandated calculation of overtime. However, the County rejects this explanation by pointing out that the Jailers' "Kelly Days" practice existed before the FLSA was made applicable to municipalities (including counties) in 1985 by a key United States Supreme Court decision.

The County believes that the reason for "Kelly Days" under a 6/2 work schedule was to bring down yearly total hours to average out at 2080 hours per year (or 40 hours per week) by

scheduling an extra 13 days off during each year. In the County's view, the concept of "paid Kelly Days," however, is a different term intended to address a different problem. As _ 5.1 of the parties' collective bargaining agreement states from the first bargained contract to the present time, the explicit rationale is "to compensate for working a longer-than-normal work week" by pay equalization or averaging out paychecks for employees working the 6/2 schedule because the number of hours worked in a given biweekly pay period cannot otherwise be uniform under such a work schedule.

The County then examines closely the events leading to the Union's December 23, 1999 written grievance which claimed the Employer improperly failed to pay downtown jail employees working a 6/2 schedule for their 13 annual "paid Kelly Days." The County contends that a serious mistake was made then made when this grievance was "prematurely and erroneously" "granted" by the County's then Director of the Department of Administration (subject to the contractual provision that retroactive pay must be limited to a maximum period of 90 days immediately prior to a written grievance). Ever since 1999, the County has made payments totally over one million dollars pursuant to this "ill-advised" grievance "settlement" despite the fact that bargaining unit members at both the downtown jail and the Detention Center have the same job description and the same pay schedule and despite the fact that no additional money was ever budgeted for "paid Kelly Days" either when the first contract was approved in 1986 and made retroactive to 1984 or at any time thereafter until 2000 nor was any grievance ever filed during the first 16 years when the County consistently implemented its understanding of the meaning of _ 5.1 and its reference to "paid Kelly Days."

The County emphasizes the inequity resulting from the "settlement" which has separated bargaining unit members working at the downtown jail from those working at the Detention Center, the enormous and continuing costs to County taxpayers for these payments, and the lack of any significant inconvenience or impact upon the unit by the County's proposal to have downtown Jailers work the same schedule as do the Detention Centers Direct Supervision Officers. The Employer believes that this proceeding provides the first real opportunity to correct the "obvious mistake" made by and inequities resulting from the 2000 "settlement." It believes that its quid pro quo (paying Jailers for "Kelly Days" until the last shift of 2004 together with 20 cents per hour for <u>all</u> bargaining unit members commencing with that last shift) is adequate - although "perhaps not even necessary" since the County's offer reflects a 50/50 split annually between the County and the Union of the cost savings of the County's work schedule proposal which eliminates Kelly Days entirely.

The County concludes this portion of its argument by stating that its final offer relating to work schedules at the downtown jail is the more reasonable one because, among other reasons, it makes a good faith attempt to addresses a very costly mutual problem and reflects a fair compromise which promotes the public interest and fosters good labor-management relations without any undue hardship to the employees involved.

3) Final Offer Whole Package

The County summarizes its arguments in support of its whole package by emphasizing the overriding point that current political climate and economic conditions demand tighter fiscal planning and responsibility. The County has offered more in wages than the Union has because there are sound reasons for giving something in return for needed changes in health insurance and "Kelly Days" to allow better management and cost control. The County emphasizes that its good relationship with all ten of its bargaining units is reflected by the fact that the last interest arbitration case it had was 17 years ago. Thus, the County reiterates the statutory factors mostly ignored by the Union but which the Arbitrator must consider: the "greatest weight" to the statutory limitations on revenues and expenditures, the "greater weight" to local economic conditions; and the relevant "other factors" such interest and welfare of the public and total compensation packages. For all these reasons, the County requests that the Arbitrator select its final offer whole package because, unlike the Union's final offer whole package, it is justified by the statutory factors.

4) Union Objections to Post-Hearing County Exhibits

In its post-hearing brief, the County explicitly requested that the record in this proceeding remain open in the event that a court decision on pending litigation (involving a claim for a civil penalty by some bargaining unit members based upon the County's actions relating to pre-1998 "Kelly Days") be handed down or for any settlement or award with respect to another County bargaining unit (clericals) represented by the Union which might become available before the issuance of an award in this proceeding. More generally, the County refers to Wis. Stat. _111.70(4)(cm)7r.i as the basis for its position that its post-hearing submissions are proper, noting that the section dealing with "other factors" specifically includes "changes in any of the foregoing circumstances during the pendency of the arbitration." The County relies upon Black's Law Dictionary for its definition of "proceedings." That definition states that the word includes "all possible steps in an action from its commencement to the execution of judgment." Accordingly, the County concludes that all of its post-hearing submissions are appropriate and should be made part of the record herein.

The Union

1) Work Schedule Issue

The Union devotes most of its arguments to the County's proposal to change the work schedule for bargaining unit members employed at the downtown jail so that all bargaining unit members whether working at the downtown jail or the Detention Center will have the same job title and description, the same work schedule, and the same wages. The Union concludes that the County's proposed change would have a "devastating" impact upon the annual earnings of all downtown jailers because the County's proposal represents a loss per employee of approximately $1800 annually for "paid Kelly Days"while the "offset" offered in the County's final offer of 20 cents per hour amounts to only $400 annually per each bargaining unit employee regardless of work location.

To support its argument, the Union reviews the parties' bargaining history beginning with the parties' first agreement in 1986 covering the years 1984 through 1986 at a time when bargaining unit members were employed only at the downtown jail (before the creation of the Detention Center in 1998). In this initial agreement, the parties included a section (Article V) on Hours which stated:

> Section 5.1 - Full-Time Employees: All full-time employees shall work a "six-two" ("6/2") work week, consisting of six (6) consecutive days of work followed by two (20) [sic] days off. To compensate for the longer-than-normal work week, each employee on the "six-two" work schedule shall earn one (1) paid "Kelly Day" for every four (4) calendar weeks.

This contractual language is to be found unchanged in all of the parties' collective bargaining agreements, including its most recent one for 2000-2002. (After the establishment of the Detention Center and the subsequent accretion of Detention Center jailers, called Direct Supervision Officers or DSOs, into this unit, however, their different existing work schedule,[2] frequently referred to as the "federal" schedule, was expressly continued in new _ 5.1(b) while the downtown jailers' 6/2 work schedule and the contract language of Section 5.1 remained without any change in newly renumbered _ 5.1 (a).)

The Union recounts in detail events in late 1999 and early 2000 relating to a written Union grievance dated December 23, 1999 filed on behalf of all bargaining unit members working at the downtown jail (and earlier presented to an immediate supervisor by the aggrieved employee, as required by the parties' negotiated grievance procedure) claiming that the County had violated the parties' collective bargaining agreement by not paying downtown jailers for "Kelly Days."[3]

On the same day, the County's Personal Services Director wrote a memo informing the Sheriff, his Chief Deputy, and "All 990 Jail Staff Members" that the County had discovered it was not paying eligible employees for "Kelly Days." This memo was followed up by a second memo from the Personnel Director dated January 19, 2000 to the Chair of Local 990 and to the Wisconsin Council 40's Staff Representative for Local 990 stating the County's intent "on an interim basis" for the first quarter of 2000 to pay "Kelly Days" to bargaining unit members working at the downtown jail on a 6/2 schedule pending completion of the County's review of the issue. Assuming that the action taken by the County persuaded the Union to hold its grievance in abeyance in light of the County's "Kelly Days" payments during the first quarter of 2000 and its continuing review of the issue, he characterized this as a "mutual cooling off period." The end of this second memo noted that it was distributed to many key County officials, including its Corporation Counsel, and to its outside labor law counsel.

Thereafter, on March 21, 2000, a memo was sent from both County's Director of the Department of Administration and its Personnel Director to all bargaining unit members at the downtown jail stating that "the County is granting the [Union's December 23, 2000] grievance," subject, however, to the contractual liability limitation governing retroactive payments of grievances involving loss of pay to 90 calendar days before the date the grievance is first

presented in writing.[4] Finally, on March 24, 2000, a follow-up memo was sent by the County's Director of the Department of Administration and the Personnel and Assistant Personnel Directors to the Union Chair and the Union's District Council 40 Staff Representative stating that "it is the continuing intention of the County to pay for Kelly Days in accordance with the contract effective with the second quarter of fiscal year 2000." As a result of retroactive payments to eligible bargaining unit members, "the County considers the issues addressed in the December 23, 1999 grievance to be fully resolved and settled." The memo concludes that "there does not appear to be any grievance remaining, which must be held 'in abeyance." Again, the memo's distribution list indicates copies are to be sent to key County officials, including the Corporation Counsel, and the County's outside labor law counsel.

The Union completely rejects the County's argument that this grievance settlement was in error, was solely due to one "rogue" County official, the Director of the Department of Administration, and was concluded without any official County knowledge and sanction. Since neither the merits of this 1999 grievance nor its 2000 settlement have ever been challenged by the County in an appropriate or timely legal manner, the Union concludes that the past four years reflect a consistent County practice of paying extra for "Kelly Days" for bargaining unit employees working a 6/2 schedule at the downtown jail. To the Union, this present County practice epitomizes belated County adherence to the longstanding, clear, and unambiguous language of _5.1 of the parties' collective bargaining agreement and establishes the status quo which the County wishes to change now without offering any reasonable or adequate quid pro quo, as required by arbitral precedents.

The Union points out that the County is not making an (in)ability to pay argument. This is apparent in light of the fact that the total cost of the County's package, according to its own witnesses and exhibits, is greater than the Union's package. Also, the Union notes that the County's mill rate is at its lowest point since 1998, its reserves are at their highest levels since 1960, its taxing capacity allows for an additional $2.3 million in revenue, and the percentage of its personnel costs decreased somewhat in 2004 from 2003. Thus, the Union believes that the County has exaggerated its current financial plight.

The Union further justifies its position in regard to the hours of work for downtown jail employees by observing that their annual work hours, including paid holidays, are greater than the external comparables established by Arbitrator Frank Zeidler in his 1986 interest arbitration award covering a bargaining unit of Kenosha County Professionals (social workers). The Union also contends that the County's proposal to change the work hours schedule for downtown jail employees is not supported by its own agreement with the deputy sheriffs bargaining unit.

Finally, in regard to the issue raised by the County that there should be a uniform work schedule for all bargaining unit members, the Union contends that the duties of employees (Direct Supervision Officers) at the Detention Center differ significantly from those of employees (correctional officers) at the downtown jail. While direct supervision officers can apply for openings at the downtown jail and vice versa, if the bargaining unit applicant is selected, he/she must be specifically trained (similar to a new hire) and serve a new probationary

period. If he/she fails to pass the probationary period, there is a right to return to the applicant's former bargaining unit position. There are, accordingly, recognized differences between working at the Detention Center versus the downtown jail which justify the different contractual working conditions at these two different County locations. Accordingly, absent mutual agreement based upon an adequate quid pro quo to eliminate "paid Kelly Days," the Union concludes that its final offer on this issue is more reasonable and should be selected..

2) Health Insurance

The Union argues that the County's proposal to change this bargaining unit's health insurance plan is not supported by internal or external comparables. It notes that represented County employees are currently covered by three different health insurance plans. The Union takes a skeptical view of the County's comparable health plan analysis because the County's insurance consultant did not consider all plans (and perhaps more costly plans) available to comparable employees elsewhere. The Union believes the results were skewed by considering only the most popular plan of a comparable. Finally, the Union points to the Union's lack of opposition when the County changed from an indemnity plan to a self-funded program in 2003 which resulted in a savings to the County of over one million dollars as an example of Union cooperation to save County health care dollars. For these reasons, the Union concludes that the County's proposed changes in health care plans contained in its final offer is not as reasonable as continuing with the contractual status quo on this disputed issue, as advocated by the Union.

3) Wages and Final Offer Whole Package

The Union argues that its wage proposal of 3% across the board for 2003 and 3% across the board for 2004 (with health insurance remaining as is) is modest and in line with the recent tentative agreement reached between the County and the Professional Unit represented by Local 990 even without consideration of that unit's additional 1% for automatic reclassifications and also in line with numerous external comparables.

The Union concludes by making the point that this case is not about health insurance and wages because, if it were, it has been clearly established that the Union's final offers are less expensive than the County's final offers. To the Union, this case is about the County's attempt to reopen the issue as to whether downtown jail employees should continue to receive paid "Kelly Days," as stated in the parties' collective bargaining agreement, as agreed to by the County in the 2000 grievance "settlement," and as implemented by the County in the intervening years. The Union believes that the County's attempt to offer bargaining unit members only $400 annually in exchange for an existing negotiated benefit of $1800 annually for each downtown jail employees working a 6/2 schedule "must be rejected out of hand." For all the reasons it has discussed, the Union concludes that its whole package is to be preferred.

4) Union Objections to Post-Hearing County Exhibits

Following the exchange of post-hearing briefs, the Union submitted a letter in which it

objected to the County's submission of new exhibits appended to the County's brief (in addition to those agreed upon at the May 26, 2004 hearing) and to the County's request to submit additional exhibits and evidence prior to the issuance of an arbitration award in this proceeding. In its letter, the Union cited decisions by a number of Wisconsin interest arbitrators refusing to allow additional post-hearing evidence and/or exhibits which were not mutually agreed upon by the parties at the hearing. After observing that "the record in the instant matter is more than extensive," the Union asks that all post-hearing exhibits (except those mutually agreed upon or requested at the hearing by the Arbitrator) whether attached to the County's brief or submitted otherwise by the County not be considered in issuing the Award in this proceeding.

DISCUSSION

This arbitration proceeding concerns a bargaining unit of approximately 150 County civilian employees of the Kenosha County Sheriff's Department. Approximately one half of the unit works at the downtown jail and the other half works at the Kenosha County Detention Center. The arbitration occurs during a period when the County and other Wisconsin municipalities - indeed Wisconsin State government itself - are facing serious and continuing economic challenges in the financing and provision of public services. These problems which were extensively documented in the County's exhibits and discussed in its brief, form the background for this discussion. They clearly must be considered, particularly after changes to _111.70(4)(cm)(7) which added the "greatest weight" and "greater weight" factors which must be considered in an interest arbitration decision pursuant to MERA. While it is true, as the Union has noted, that the County has not made an (in)ability to pay argument and that there are several bright spots in the County's financial situation (such as its current "low" mill rate and additional taxing capacity) and it is also true that the "greatest weight" factor covers a narrower range of evidence than the County has relied upon under this now salient statutory factor, documented financial problems facing the County are real and must be taken into account whether they fall under _111.70(4)(cm)(7), (7g), or 7r). A "difficulty to pay"argument is now of greater relevance in MERA interest arbitrations than it may have been earlier, due to changes in the statutory factors.

In addition to the exhaustive record created in this proceeding, this arbitration is somewhat unusual for at least two reasons. First, because the Union's final offer to continues a) its existing 6/2 work schedule at the downtown jail together with "paid Kelly Days" as interpreted by the County's March 2000 "settlement" of the Union's December 23, 1999 grievance, and b) this bargaining unit's current contractual health insurance benefits, the Union's wage offer is lower than the County's final offer. Second, the County supports in substantial part its final offer (designed to eliminate "paid Kelly Days") with an argument that the "Kelly Days" grievance "settlement" in 2000 was erroneously implemented by a "rogue" County administrator, the then Director of the County's Department of Administration, and that any reasonable outcome in this interest arbitration proceeding would acknowledge the County's prior 16 year consistent payroll practice in implementing contractual "paid Kelly Days" without a single grievance being filed challenging the County's implementation of _5.1 until December 23,

1999.

1) Work Schedule Changes (including "Paid Kelly Days")

Both parties concentrated many of their arguments both during the hearing and in their briefs on the "paid Kelly Days" issue. Accordingly, this Arbitrator believes it merits priority consideration. The County claims that until receipt of the Union's December 23, 1999 grievance, it had uniformly implemented the language in _5.1 relating to "paid Kelly Days" as a means of equalizing employees' biweekly paychecks to reflect 80 hours each regardless of the hours actually worked under the 6/2 schedule during the two week pay period. Moreover, during that long period of unchallenged interpretation, no grievance had been filed by any unit member or the Union and no County budget estimate had ever been prepared to cover any additional costs associated with "Kelly Days" since the initial language of _ 5.1. was first proposed in 1986. According to the County, these facts provide strong support for the County's interpretation of that section. Although some County officials believed at the time the 1999 grievance was submitted and reviewed internally by management that their position rejecting any County liability was correct and would be upheld if the issue were to be litigated before a grievance arbitrator, the dispute was "prematurely"and "improperly" "settled" by a decision of the County's Director of the Department of Administration. Regardless of these arguments, the "settlement"[5] and continuing costs for "paid Kelly Days" since then (including additional retroactive pay as a result of the DWD administrative determination) have without dispute amounted to a significant County expenditure - one the County now argues is unnecessary and presents a continuing and divisive issue for members of this bargaining unit.

Thus, it is easy to understand why the County now wishes to reopen the substance of the "settlement" and obtain a new determination based upon the merits of its arguments and evidence. This proceeding, however, is not an opportunity to litigate the parties' various interpretations of _5.1"s reference to "paid Kelly Days" for several reasons. First, although the County puts forth arguments that the grievance "settlement" was improperly made by a County official who was without authority to make that decision, the County Corporation Counsel himself is on record stating that the "rogue" County official had at least apparent authority to settle the grievance. The Arbitrator concurs with the position that the Union had a solid legal basis to rely upon the written statement by this County official with apparent authority when he wrote the Union "granting the grievance," subject to the contractual 90 day limitation on retroactive pay. Further, the County has continued to pay for "paid Kelly Days," as interpreted in response to the Union's written grievance, since the year 2000 . Thus the 2000 grievance "settlement" changed the earlier 16 year status quo, as characterized by the County, to a more recent status quo which entitles downtown Jailers when working a 6/2 schedule to "paid Kelly Days" as interpreted by the Union. In the view of the Arbitrator, there is no opportunity for the County to reopen the merits of the 2000 "settlement" at this late date in this proceeding. However, that conclusion does not dispose of that issue since the questions this Arbitrator must address are which party's work schedule final offer is more reasonable under Wisconsin law and ultimately which party's final offer whole package is more reasonable under Wisconsin law.

[As an aside, it is interesting to note that at the arbitration hearing, no witness was called by either side who had first hand knowledge about why "paid" was explicitly placed before "Kelly Days in the language of _5.1 and what the negotiators intended it to mean. Instead, testimony related to how County management consistently implemented the provision initially and from 1986 onwards. Testimony and arguments about the origins of these parties' contractual language in _5.1 provide a number of possible explanations. One explanation emphasizes the explicit rationale contained in that section to "compensate for the longer-than-normal work week" and the fact that employees working a 6/2 schedule had a longer workweek than other employees who worked a traditional 5/2 workweek. Another and different explanation relates to wishes by employees working a 6/2 schedule to "even out" their two week pay periods so that paychecks would be the same regardless of whether a 6/2 work schedule employee worked 72 or 88 hours in any given week of the two week pay period. While many employees no doubt preferred uniform biweekly paychecks, the language of _5.1 suggests that a "paid Kelly Day" had more to do with inconveniences or burdens of working 6 consecutive days followed by rotating two days off rather than working a more traditional schedule of 5 consecutive weekdays with regular weekend days off. Others have speculated that the _5.1 language approved in 1986 and made retroactive was influenced by the FLSA and the 1985 United States Supreme Court decision extending FLSA to municipalities.]

While the origins, meaning, and intent of the unique language in _5.1 have not been established to date, the undersigned believes that this proceeding is not the forum for such a determination since her task must focus upon the parties' final offers. If the Union's final offer whole package prevails and the 6/2 schedule remains for bargaining unit members at the downtown Jail, the County's 2000 "settlement" understanding of _5.1 continues to be part of that section, unless there is mutual agreement to the contrary. If the County's final offer whole package prevails, the 6/2 work schedule at the jail will be changed to the Detention Center's work schedule. If, for any reason, the 6/2 work schedule is eliminated, the stated need for paying extra for "Kelly Days" ("to compensate for the longer-than-normal work week") will disappear. In the judgement of this Arbitrator, downtown Jailers do not have a "vested right" to the additional yearly compensation for "paid Kelly Days." They were only entitled to it under the contract when they worked a 6/2 schedule. The extra compensation is explicitly tied to difficulties associated with working a 6/2 schedule and thus the need for this extra compensation vanishes when the 6/2 work schedule is eliminated. Under the County's final offer, the 6/2 work schedule for downtown Jailers is replaced with a uniform application of the Detention Center's work schedule which includes longstanding explicit contractual language stating there are no"Kelly Days."

Under this analysis, it is unclear what, if any, quid pro quo is needed to support the County's proposed change from the 6/2 work schedule for downtown Jailers to the Detention Center work schedule. The Union contends that the "buy-out" offered by the County on this issue is insufficient while the County contends that its work schedule proposal for downtown Jailers is to be preferred as more equitable because all bargaining unit members will be covered by a uniform work schedule, the County will benefit from no "Kelly Day" compensation, and all bargaining unit members will benefit from the 50/50 split of "Kelly Day"savings between the

County and employees in this unit. If changing the downtown Jailers' 6/2 work schedule, including additional pay for "Kelly Days," were the sole issue in dispute, the Arbitrator believes that the County's final offer should be selected. She rejects the Union's position that downtown jailers have an entitlement to "Kelly Day" pay and must receive a more substantial quid pro quo for work schedule changes which eliminate the explicit contractual rationale for "Kelly Day" pay than the County is offering. She believes the County's final offer on this issue is more reasonable because of its attendant cost-saving benefitting both the County and bargaining unit members who will be splitting the savings and because it provides 24/7 coverage under a work schedule which has proven itself over the course of many years at the County Detention Center as well as at many other public facilities following the "federal schedule." Although she believes that the statutory factors favor the County's work schedule (which eliminates contractual paid "Kelly Days), she wants to make clear that County arguments centering on the December 23, 1999 Union grievance and the County's 2000 "settlement" played no role in the selection of the County's final offer on this issue. She does not believe that the County's attempt to use this forum to litigate belatedly the merits of these issues was appropriate or relevant.

2) Wages and Health Insurance

The County has presented a picture of a municipality with serious economic and legal constraints in dealing with the many economic demands facing it from total personnel costs to capital improvements. Both the factors which must be given "greatest weight" and "greater weight" take many of these issues into account. Given these economic - and legal - facts of life, an argument can be made that the public interest in Kenosha County in the short run would be best served by choosing the final offer of the party which is least expensive during this contract period. Since the Union's final offer wage increases are overall less than the County's offer and the County's savings (from health insurance and work schedule changes) will not begin until next year, one could make a plausible argument that the short term welfare and the interest of the public would be best served by choosing the Union's final wage offer, if that were the only issue to be considered. However, such an approach is superficial. Longer term consequences need to be taken into account as well.[6]

As for the important changes in health insurance proposed by the County, its final offer is designed to bring this unit's health insurance in line with those of the County's other bargaining units and is intended to address the national issue of rapidly rising health care costs which are adversely affecting private and public sector employers and employees alike. In an effort to reduce somewhat the impact of escalating health insurance increases on the County's budget, the County has proposed that this bargaining unit change to the health and dental insurance plan in Local 990's current collective bargaining agreement covering Professionals (Social Workers). As a quid pro quo, the County has committed itself to a 3.5% increase in wages at the end of this contract, 12/31/04, as well as an additional 48 hour payment to each bargaining unit member prior to 12/31/04. It should be noted that this proposed plan, like the current plan covering this bargaining unit, does not require any direct employee contribution to health care premiums. When it is in effect, the new plan establishes or increases employee co-pays for hospital use, physician office visits, and prescription drugs. According to County testimony and exhibits, the

new plan still provides a generous overall benefit package when compared with benefit packages of a number of Wisconsin counties and has been voluntarily adopted by the County's other bargaining, units. In this era of rapidly escalating health care costs which is producing a spreading crises throughout our nation, it is not unreasonable to expect that all County employees, including members of this bargaining unit, absorb some of the increases for their health care. It is also not unreasonable that the County wishes its employees be covered by a health plan that promotes turning patients into knowledgeable and cost-conscious consumers of health care services. Whether this consumerism approach will become a significant key to controlling future health care costs is yet to be determined but steps taken in this direction hold out some promise.

Accordingly, based primarily upon the pattern already established within the County for health care plans for its other bargaining units, if health care were the only unresolved issue between the parties, the Arbitrator believes the County's final offer is more reasonable. In light of rapidly rising costs for health care services and prescription drugs, the County's effort to enlist assistance from all its employees to help control this large - and rapidly escalating - County budget item is a common route now taken by many public as well as private sector employers who continue to provide the bulk of funding for these key job benefits. (Given the costs involved, it is no longer appropriate to consider this benefit a "fringe benefit.") Given the very high cost of health care, particularly in southeastern Wisconsin, the County would be remiss if it failed to explore seriously ways to contain at least some of its rapidly rising health care expenditures.

3) Union Objections to Post-Hearing County Exhibits

Before the May 26, 2004 hearing was concluded, it was agreed that the County would have ten days to resubmit County exhibits intended to be made part of the record at the May 26, 2004 hearing which it discovered at the hearing needed correction. Subsequently, the County requested and the Union agreed to an extension of the time period for submission of corrected exhibits. On June 15, 2004, the County mailed to the undersigned , the Union, and the Court Reporter a packet of revised and additional County exhibits. In addition to the agreed upon revised exhibits, new Exhibit #207 was the County's response to a question the Arbitrator asked at the hearing concerning the cost savings to the County which would result from the changes it proposed to this bargaining unit's health plan. New Exhibit #208 is the County's response to the Union argument that the Union's final offer retaining paid "Kelly Days" was supported by the County's collective bargaining agreement with the Deputy Sheriffs. The undersigned believes this second new exhibit is appropriate because it provides information directly related to an issue raised by the Union at the hearing.

When the County filed its September 1, 2004 brief, however, it also submitted a variety of additional exhibits. Most of the new exhibits are post-hearing newspaper articles indicating that the financial difficulties facing the County described at the hearing and included in County exhibits made part of the record at the hearing have continued after the hearing. Exhibit #214 is a County press release dated 8/3/04 indicating that the County's credit rating had been upgraded

by Moody's Investors Services so that there will be future interest savings on future County bond and note issues based in part on the County's stabilized financial position with relatively healthy reserve levels. None of these new exhibits appear to reflect changes in the economic picture already presented by the County at the hearing. Accordingly, these post-June 15, 2004 exhibits do not reflect post-hearing "changes in circumstances" as referred to in _111.70(4)(cm)(7r)(I) and should not be incorporated into the record.

Finally, on September 24, 2004, the County forwarded to the Arbitrator and the Union a copy of a Kenosha County Circuit Court order dated September 20, 2004 dismissing the claims of all the remaining plaintiffs on their merits. This case relates to post-grievance"settlement" claims for civil penalties brought on behalf of some Kenosha County Jailers based upon allegations that the County had concealed its failure to pay for "Kelly Days." The Arbitrator does not believe that the DWD's 2000 administrative determination nor the court litigation subsequently commenced are relevant in this proceeding. Therefore, she does not believe it is appropriate to include this document in the record of this proceeding.

4) Final Offer Whole Package

The discussion above considers each of the three issues in dispute separately, Wisconsin's form of interest arbitration under _111.70(4)(cm) requires an arbitrator to select the whole package of one party after consideration of the statutory factors. For the reasons already discussed, the undersigned selects the final offer whole package of the County.

AWARD

Based upon the testimony and evidence introduced in this proceeding, the arguments of the parties, the statutory factors listed above which must be considered, and for the reasons discussed above, the Arbitrator selects the final offer of the County and directs that it be incorporated together with all items tentatively agreed upon into the parties' collective bargaining agreement for 2003 through 2004.

November 17, 2004
Madison, Wisconsin

June Miller Weisberger
Arbitrator